Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DONALD SMITH, BENTLEY MCDONALD
BRIAN FARMER, AND JAMES CRULL,

Petitioners,

v.

MARILYN ALLEN, Personal Representative
of Terry Allen, deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 11, 1997

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QUESTION PRESENTED

Whether a law enforcement officer's otherwise reasonable use of deadly force in self-defense becomes an unreasonable seizure in violation of the Fourth Amendment solely because the officer's conduct prior to the shooting, which is found to be consistent with the officer's training, may have made the need to use deadly force more likely.

PARTIES

The following persons are petitioners in this Court: Donald Smith, Bentley McDonald, Brian Farmer, and James Crull. Marilyn Allen, personal representative of the estate of Terry Allen (deceased), is named as respondent in this Court pursuant to Supreme Court Rule 12.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of *certiorari* be issued to review the ruling of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 119 F.3d 837 and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App."), beginning at page 1a. The unpublished order of the United States District Court of the Eastern District of Oklahoma, granting the Petitioners' motion for summary judgment, was entered on January 5, 1997 and appears at Pet. App. 21a.

JURISDICTIONAL STATEMENT

The court of appeals entered its order and judgment on July 17, 1997 and denied the timely petition for rehearing and suggestion for rehearing *en banc* on September 12, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

Section 1983 of Title 42 U.S.C. provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case concerns the appropriate factors to be considered in determining whether the use of deadly force by law enforcement officers to effect a seizure of a person satisfies the test of objective reasonableness mandated by the Fourth Amendment to the Constitution of the United States. The decision below held that the conduct of the officers prior to the moment at which they were forced to apply deadly force was relevant to whether their use of force was reasonable. Although it was undisputed that the decedent presented a clear and imminent threat to the lives of the police officers when he aimed his gun at them as they stood beside the car in which he was sitting, the court below determined that the reasonableness of the officers' use of force at that moment should be judged, in part, upon the demeanor of one of the officers as he approached the car and cleared the area of bystanders. The Tenth Circuit's holding eviscerates the test of objective reasonableness crafted by this Court and directly conflicts with the holdings of other courts of appeals that the actions of law enforcement officers preceding the use of deadly force are not relevant to the issue whether that use of force is reasonable under the Fourth

Amendment.

1. Respondent Marilyn Allen brought this lawsuit against the petitioners for the alleged wrongful death of her deceased spouse, Terry Allen ("Allen"). Allen was killed on February 20, 1994 in Muskogee, Oklahoma during an exchange of gunfire with members of the Muskogee Police Department. Respondent alleges that Allen's death was caused by petitioners' use of excessive, unreasonable, and deadly force in violation of the Fourth Amendment. The district court found the following facts to be undisputed.

On February 20, 1994, the Allens were involved in an escalating argument that culminated with Terry Allen committing a battery against his wife and their children at their home in Porter, Oklahoma and threatening to kill them. Following the altercation, Allen left the house in Porter, and a neighbor of the Allens reported the incident to the Wagoner County Sheriff's Office. The Wagoner County Sheriff's Office sent a teletype to the Muskogee, Oklahoma Police Department describing Allen and his car and advising the Muskogee Police that Allen was armed and had threatened a family member. The teletype also noted that Allen was wanted on an arrest warrant from 1983 for impersonating a police officer. Muskogee Police Lieutenant Donald Smith relayed this information to other officers at a squad meeting early that afternoon.

Allen called his wife a short time after leaving their house and told her that he was going to kill a man that he believed to be responsible for his brother's death in an automobile accident several years earlier. Allen told his wife that he would then commit suicide. He traveled to the home of his sister, Rhonda Oakley, in Muskogee, Oklahoma. Upon his arrival, Allen told Ms. Oakley, "I'm gonna die today, either by the pills or a policeman's gun," and he claimed to have "killed three people

on Highway 16." Ms. Oakley dialed 911 and reported that Allen had overdosed on drugs and alcohol, that he was drinking and suffering chest pains, and that he was carrying guns. The Muskogee Police dispatcher advised Lieutenant Smith of the 911 call, and Lieutenant Smith responded to the Oakley residence.

Officers Brian Farmer, Bentley McDonald, and James Crull of the Muskogee Police Department arrived at the Oakley residence to provide backup. Each of the police officers on the scene had been present at the squad meeting at which the Wagoner County Sheriff's advisory was circulated and discussed. Upon arrival, the officers saw Allen sitting in his car with three onlookers standing around the driver's side door. As Lieutenant Smith approached the driver's side of the vehicle, he ordered the three bystanders away from the car, and they complied. One of the bystanders told Lieutenant Smith that Allen had a gun. The driver's side door was ajar, and Lieutenant Smith saw Allen sitting in the driver's seat with one foot resting on the ground outside the car. Lieutenant Smith observed that Allen was holding a gun in his right hand, which was resting on the console between the two front seats. By this time Officer Farmer had approached the other side of the car and was standing near the passenger door, and Officer McDonald had approached on the driver's side and was standing next to Lieutenant Smith.

Lieutenant Smith directed Allen to drop the gun. Allen refused, saying: "Go ahead and kill me. I want to die." With Officer McDonald's assistance, Lieutenant Smith tried to reach into the vehicle to disarm Allen but was unsuccessful. Allen then raised the gun and pointed the barrel toward Officer Farmer on the passenger side of the vehicle. Officer Farmer ducked down and moved to the rear of the car. Allen then swung the gun around and pointed it at Lieutenant Smith and

Officer McDonald, and shots were then exchanged between Allen and Smith and McDonald. The district court found that the opening shots were nearly simultaneous. Alien was shot four times and killed in the exchange. Neither Officer Farmer nor Officer Crull fired his weapon during the incident.

2. Respondent brought this lawsuit against petitioners, the Chief of the Muskogee Police Department, and the City of Muskogee, Oklahoma under 42 U.S.C. § 1983, alleging that the police officers' use of deadly force violated the Fourth Amendment to the Constitution of the United States. Petitioners moved for summary judgment on the basis of qualified immunity. They argued that the use of deadly force against Allen was reasonable and justified and that their actions were taken in good faith and consistent with the training and procedures of the Muskogee Police Department. The Chief of Police and the City also moved for summary judgment on the grounds that the training, policies, and procedures of the Muskogee Police Department were constitutionally adequate and that Muskogee police officers do not have a custom, pattern, or practice of using deadly force.

The district court found that there were no disputed issues of material fact and that the petitioners' use of deadly force was reasonable and thus not in violation of the Fourth Amendment. It properly analyzed petitioners' use of deadly force under the objective reasonableness inquiry set forth in *Graham* v. *Connor*, 490 U.S. 386, 394-396 (1989). The district court found that the crux of the issue was whether, from an objective viewpoint, the police officers feared for their lives (or the life of another) and reasonably reacted to that threat. Pet. App. 27a. It further found that this objective inquiry must incorporate real-time analysis rather than "20/20 hindsight." *Ibid.* Using this approach, the district court found that the police officers did not commit any violation of the Fourth Amendment and that, as a

result, "there can be no liability as to their supervisory authorities, defendants City [of Muskogee] and Eskridge." Pet. App. 25a. The district court awarded summary judgment to all defendants, and respondent appealed.

3. The Tenth Circuit reversed. *Allen* v. *Muskogee*, 119 F.3d 837 (10th Cir. 1997). Contrary to the holdings of at least five other circuits, the court of appeals stated that an inquiry into the alleged use of deadly force includes the actions taken by the police officers prior to the moment at which the force was applied. Pet. App. 5a. It fashioned a two-part test for analyzing whether the use of deadly force comports with the requirements of the Fourth Amendment:

> the reasonableness of [the officers'] actions depends both on whether the officers were in danger at the precise moment that they used force *and* on whether [their] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.

Pet. App. 5a. The Tenth Circuit thus converted the test of objective reasonableness set forth in *Graham* and *Tennessee* v. *Garner*, 471 U.S. 1 (1985), into a subjective examination of whether the law enforcement officers acted reasonably in contributing to the circumstances that occasioned the use of deadly force. It held that such conduct by a police officer is probative of the objective reasonableness of the officer's subsequent use of force if it is "immediately connected" to the actions taken by the suspect creating the need to use such force. Pet. App. 6a ("We will thus consider an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force"). In reaching this holding, the panel purported to rely on Tenth Circuit case law addressing the use of non-deadly force in seizures incident to arrests. *Ibid.*

Employing this distended interpretation of objective reasonableness under the Fourth Amendment, the Tenth Circuit found that disputed issues of material fact concerning the conduct of the police officers when they first arrived at the Oakley residence (and before the actions by Allen that led to the use of deadly force) precluded entry of summary judgment. Specifically, the court of appeals found that "some deposition testimony indicates that Lt. Smith ran 'screaming' up to Mr. Allen's car and immediately began shouting at Mr. Allen to get out of his car; other testimony indicates that Lt. Smith approached cautiously, and tried talking Mr. Allen into giving up the gun." Pet. App. 6a. Notwithstanding its finding that the police officers acted in accordance with their training, *id.*, at 10a-12a, the court characterized this dispute as material because the actions of Lieutenant Smith "were so 'immediately connected' to Mr. Allen's threat of force that they should be included in the reasonableness inquiry. *Id.*, at 6a.[1]

REASONS FOR GRANTING THE PETITION

THE HOLDING BELOW DISTORTS THE FOURTH AMENDMENT'S OBJECTIVE REASONABLENESS STANDARD AND DEEPENS AN EXISTING CONFLICT AMONG THE COURTS OF APPEALS CONCERNING THE FACTORS TO BE CONSIDERED IN THAT INQUIRY.

1. The use of force by police officers is a seizure within the meaning of the Fourth Amendment, *Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985), and "all claims that law enforcement officers

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[1] The Tenth Circuit did not explain how Lieutenant Smith's efforts to secure the area and move bystanders away from an armed and intoxicated fugitive were connected or bore some relation to Mr. Allen's decision to threaten and fire upon the police officers.

have used excessive force -- deadly or not -- in the [seizure] of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard," *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). Although this standard "is not capable of precise definition or mechanical application," *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979), this Court has consistently emphasized that the inquiry is *objective* and does not turn on the subjective intentions of the officers. *E.g.*, *Graham*, 490 U.S. at 397 (citing *Scott*, 436 U.S. 128, 138 (1978)); *Brower* v. *Inyo County*, 489 U.S. 593, 598 (1989) (citing authorities); *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968).

Thus, the reasonableness of the use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 20-22). This approach reflects "the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Id.* at 396-397. For this reason, the Court has repeatedly emphasized that lower courts may not engage in "unrealistic second-guessing," for "[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985). The need for a rigidly circumscribed inquiry is even more pressing in the context of deadly force, where police officers must rely upon their training and experience in making nearly instantaneous decisions that often mean the difference between life and death for the officers or innocent bystanders, as typified by the facts of this case.

Accordingly, *Graham* and *Garner* properly direct that in cases of deadly force the Fourth Amendment inquiry is confined

to the moment when the police officer or a bystander is threatened -- *i.e.*, "reasonableness at the moment." *Graham*, 490 U.S. at 396; see also *Garner*, 471 U.S. at 11. To date, however, the Court has not specifically defined the critical term of this objective test -- "reasonableness at the moment." As detailed below, the result has been confusion among the lower courts. *Infra*. And a few circuits, like the court of appeals below, have so expanded the concept of "the moment" as to gut the objective reasonableness test altogether.[2]

The decision below casts aside the underpinnings of this Court's Fourth Amendment jurisprudence and in its place adopts an amorphous and unwieldy inquiry that asks not whether the officers' use of force was objectively reasonable when applied but, rather, looks backward in time to determine -- subjectively -- whether the officer's conduct preceding the use of force may have increased the probability that such force would become necessary. Pet. App. 5a ("the excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force"). The test employed by the court of appeals might be characterized as "subjective reasonableness prior to the

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[2] Indeed, the approach adopted below, in addition to expanding the temporal scope of the reasonableness test, requires that a court examine the subjective intentions of the police officers. See Pet App. 5a ("the reasonableness of Defendant's actions depends [in part] on whether Defendant's own reckless or deliberate conduct during the seizure unreasonably created the need to use such force"). By asking whether a police officer consciously disregarded a substantial risk that his actions would create circumstances requiring the use of deadly force or willfully created such circumstances, the court of appeals' analysis runs afoul of the settled rule of decision that a law enforcement officer's state of mind has no bearing upon whether the use of force is objectively reasonable. See *Graham*, 490 U.S. at 397; *Brower*, 489 U.S. at 598; *Terry*, 392 U.S. at 21.

moment."

Any interpretation of the Fourth Amendment that a police officer's prior error in judgment, even if it does increase the probability that the officer may later have to use deadly force, renders that use of force unreasonable would have far-reaching negative consequences. If that were a rule of decision, a police officer's ability to make an instant decision when facing a threat of harm to himself or others would be critically impaired by his constitutionally compelled duty to reexamine his conduct leading up the moment when his finger is on the trigger and an armed and intoxicated fugitive is pointing a revolver at his head. The Tenth Circuit's standard forces that officer to make a Hobson's choice between unnecessarily allowing himself (or others) to remain under the threat of bodily injury or death on the one hand or becoming liable under Section 1983 to the suspect (or the suspect's estate) for using deadly force to defend himself on the other. According to the panel below, the officer's use of force in that situation could result in a violation of the suspect's constitutional rights *regardless* of the objective reasonableness of the officer's belief that his life was in imminent danger.

This Court has endeavored to craft a body of Fourth Amendment jurisprudence that delivers clear and unambiguous directions to law enforcement officers regarding the reasonableness of searches and seizures. In no area of police conduct implicating the Fourth Amendment are those directives so important as in the circumstances involving the use of deadly force. Police departments view the use of deadly force as a last resort, see *Garner*, 471 U.S. at 18-19, but as the facts of this case illustrate, there are moments when, however unfortunate, the use of deadly force is necessary to protect the lives and safety of police officers or innocent third parties. In the absence of direction from this Court, the courts of appeals have diverged

in their approach to adjudicating claims of excessive force under the Fourth Amendment, and this case presents a useful opportunity for the Court to consider and decide this issue of national importance.

2. The decision below widens the gulf between two lines of decisions by the circuit courts of appeals. On one side of this divide are the Second, Fourth, Fifth, Seventh, and Eighth Circuits, which have all held that the conduct of law enforcement officers leading up to the use of deadly force, including conduct that arguably may have made the use of such force more likely, has no bearing on the reasonableness of that use of force under the Fourth Amendment. With its decision below, the Tenth Circuit joined the First and Eleventh Circuits in holding that it is appropriate to consider the events preceding the use of force in determining whether law enforcement officers have effected an unreasonable seizure. The Court should grant the petition and resolve this irreconcilable conflict.

The Second, Fourth, Fifth, Seventh, and Eighth Circuits have concluded that the objective reasonableness inquiry looks only to the state of mind of the law enforcement officer at the moment he uses deadly force. In the earliest of these decisions, *Young* v. *City of Killeen*, 775 F.2d 1349 (5th Cir. 1989), the Fifth Circuit reviewed a district judge's determination that a police officer was liable for damages under Section 1983 for his use of deadly force precipitated by his negligent conduct and no fewer than six transgressions of "good police procedure." 775 F.2d at 1350-1351.[3] The district judge had concluded that "the

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[3] The officer's transgressions included (1) failing to use his radio, (2) failing to request backup, (3) dangerous placement of his patrol car in a "cut off" maneuver, (4) ordering the suspects to get out of their car rather than ordering them to remain in the car with their hands in plain view, (5) increasing the risk of an incident by ordering the suspects to exit the car, and (6) abandoning a

[officer]'s fault in this respect not only placed [him] in a position of greater danger but also imperiled [the decedent] by creating a situation where a fatal error was likely." *Id.*, at 1351. The court of appeals reversed. Relying on *Garner*, it found that the appropriate inquiry was whether the decedent's actions gave the officer "cause to believe that there was a threat of serious physical harm." *Id.*, at 1353. If the answer was yes, the officer's "use of deadly force was not a constitutional violation." *Id.*[4]

The Fourth Circuit emphasized the appropriate time frame for the reasonableness inquiry in *Greenridge* v. *Ruffin*, 927 F.2d 789 (4th Cir. 1991). In that case a Baltimore Police detective shot and critically injured a person suspected of unlawful activity, and in the ensuing lawsuit for damages against the officer under Section 1983, the district court excluded evidence of the officer's alleged violations of police procedures prior to the shooting. 927 F.2d at 790-791. The Fourth Circuit affirmed the exclusion of evidence, quoting and relying extensively upon this Court's discussion of the need for "split-second judgments" on the part of law enforcement officers in *Graham*. It found that *Graham* undermined the appellant's argument that, "in determining reasonableness, the chain of events ought to be traced backward to the officer's misconduct of failing to comply with the standard police procedures," and it held that the events immediately preceding the officer's face-to-face confrontation with the suspect were not probative of the

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covered position in favor of an exposed position where the odds of overreaction were greater. 775 F.2d at 1351.

[4] See also *Fraire* v. *City of Arlington*, 957 F.2d 1268, 1275-1276 (5th Cir.) (rejecting as irrelevant evidence that police officer manufactured the circumstances giving rise to the seizure by deadly force), *cert. denied*, 506 U.S. 973 (1992).

reasonableness of the officer's decision to fire her weapon. *Id.*, at 792.[5]

The Fourth Circuit in *Greenridge* also relied upon two decisions by the Seventh Circuit. The Seventh Circuit decided *Ford* v. *Childers*, 855 F.2d 1271 (7th Cir. 1988), and *Sherrod* v. *Berry*, 856 F.2d 802 (7th Cir. 1988), on the same day. As described by the Fourth Circuit in *Greenridge*:

> In both cases the court applied the Fourth Amendment's "objective reasonableness" standard by requiring that the officer's "liability be determined *exclusively* upon an examination and weighing of the information [the officers] possessed *immediately prior to and at the very moment [they] fired the fatal shot[s]*.

927 F.2d at 792 (quoting *Ford*, 855 F.2d at 1275, quoting, in turn, *Sherrod*, 856 F.2d at 805) (emphasis supplied by the Fourth Circuit). The Seventh Circuit subsequently confirmed its view that "pre-seizure conduct [by law enforcement officers] is not subject to Fourth Amendment scrutiny" in *Carter* v. *Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992). That case involved what the court of appeals characterized as a "dubious" scheme by Illinois State Police officers to arrest a suspect that ended in a wild shootout on a remote Illinois highway and the death of the suspect and one of the officers. 973 F.2d at 1329-1330. The panel found that "[e]ven if the defendants concocted a dubious scheme to bring about [the suspect]'s arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment." *Id.*, at 1333.

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[5] The Fourth Circuit subsequently reaffirmed its approach in *Greenridge* in *Drewitt* v. *Pratt*, 999 F.2d 774 (4th Cir. 1993), and *Rowland* v. *Perry*, 41 F.3d 167 (4th Cir. 1994).

Similarly, the Eighth Circuit in *Schulz* v. *Long*, 44 F.3d 643 (8th Cir. 1995), found the argument by appellant that the conduct of police officers "preceding the seizure caused the circumstances which ultimately led to the need to use deadly force" was "foreclosed" by *Graham*. 44 F.3d at 648. The Eighth Circuit reaffirmed its prior holding in *Cole* v. *Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993), that "we scrutinize only the seizure itself, not the event leading to the seizure, for reasonableness under the Fourth Amendment," and it concluded that the district court correctly excluded evidence that the police officers "created the need to use force by their actions prior to the moment of seizure." 44 F.3d at 648-649. And relying on *Long*, as well as *Fraire*, *Buscher*, and *Greenridge*, the Second Circuit held in *Salim* v. *Proulx*, 93 F.3d 86, 92 (2d Cir. 1996), that a police officer's actions leading up to a shooting "are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force." Adopting a real-time standard, the Second Circuit held: "The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force." *Ibid.*

In these decisions, the courts of appeals properly cabined the reasonableness inquiry to focus upon the circumstances facing the officer at the *moment* of the use of deadly force. Central to several of those holdings was this Court's discussion in *Graham* of the unique and dynamic challenges facing law enforcement officers on a daily basis. It is with these challenges in mind that police departments nationwide train and equip their members, but no amount of training can fully prepare a police officer for the instantaneous judgment required when the officer or an innocent third party is threatened by the immediate use of deadly force. The reasonableness inquiry accommodates this reality by disavowing a rigid methodology and instead adopting a test that attempts, as much as possible, to replicate the

circumstances in which the officer is forced to decide whether to apply deadly force -- *i.e.*, the circumstances facing the officer in the split second that he or she must decide whether or not to fire a weapon.

When it announced the decision below, the Tenth Circuit joined the First and Eleventh Circuits as the courts of appeals holding that it is appropriate to consider the events leading up to the time of the use of force in determining whether a Fourth Amendment violation has occurred. In *St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995), the First Circuit rejected the argument of the defendants, who were police officers, "that [their] actions need be examined for 'reasonableness' under the Fourth Amendment only at the moment of the shooting." 71 F.3d at 26. And in *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985), *cert. denied*, 476 U.S. 1124 (1986), the Eleventh Circuit found that the conduct of the law enforcement officers prior to the use of deadly force supported the plaintiff's allegation that the use of force was an unreasonable seizure under the Fourth Amendment. 774 F.2d at 1501-1502. Thus, in contrast to the Second, Fourth, Fifth, Seventh, and Eighth Circuits, the First, Tenth and Eleventh Circuits hold that a law enforcement officer's conduct prior to the use of deadly force should be considered in determining whether that use of force is reasonable under the Fourth Amendment.

This Court should grant the petition in order to resolve this conflict regarding the appropriate test for the use of deadly force under the Fourth Amendment. Recognizing the importance of clear rules in this area, this Court three Terms ago granted a petition for writ of *certiorari* to the Arkansas Supreme Court in "to resolve the conflict among the lower courts as to whether the common-law knock-and-announce principle forms a part of the Fourth Amendment reasonableness inquiry." *Wilson* v. *Arkansas*, 514 U.S. 927, 930 (1995). This

case presents an opportunity to address an analogous issue pertaining to the reasonableness inquiry in the context of deadly force that carries enormous significance and the resolution of which will only further the public interest in the safe and efficient enforcement of the law.

* * *

The Tenth Circuit's decision, like the decisions in *St. Hilaire* and *Gilmere*, undermines the objective reasonableness test of *Garner* and *Graham* and adds to a growing conflict among the courts of appeals. It provides this Court with an opportunity to resolve a dispute that has enormous significance for the enforcement of the laws by the law enforcement agencies of the Nation and the several States. The conflict among the courts of appeals creates tremendous uncertainty and the potential for the courts to second guess the split-second decisions of law enforcement officers in flagrant examples of Monday-morning quarterbacking. The disarray in the lower courts on this important rule of decision requires that this Court now give law enforcement officers precise guidance concerning their potential liability under the Constitution arising out of their performance of official duties in circumstances requiring the use of deadly force.

CONCLUSION

For the reasons stated, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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December 11, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-7021

Appeal from the United States District Court
for the Eastern District of Oklahoma

MARILYN ALLEN, Personal Representative of
Terry Allen, deceased,
Plaintiff - Appellant,

v.

MUSKOGEE, OKLAHOMA, a municipal corporation;
DON SMITH, BENTLEY McDONALD,
BRIAN FARMER, and JAMES CRULL,
Defendants - Appellees.

Filed: July 17, 1997

Before KELLY, BRISCOE, and LUCERO, Circuit Judges.

PAUL KELLY, Jr., Circuit Judge.

Plaintiff-Appellant Marilyn Allen appeals from an adverse ruling on her civil rights claim under 42 U.S.C. § 1983 as personal representative, alleging that the defendants used excessive force against her deceased husband in violation of the

Fourth Amendment. The district court granted summary judgment to the individual Defendant-Appellee police officers on the ground that they did not violate the Fourth Amendment. Having determined that no constitutional violation occurred, the court also granted summary judgment to Defendant-Appellee City of Muskogee. Our jurisdiction arises under 28 U.S.C. § 1291. A unanimous panel reverses the judgment as to the individual officers, and a divided panel reverses as to the city.

Background

On the morning of February 20, 1994, Terry Allen left his home after an altercation with his wife and children. He took ammunition and several guns with him, and later parked in front of the Muskogee residence of his sister, Rhonda Lee-Oakley. The altercation was reported to the Wagoner County Sheriff's Department, which sent a teletype to the Muskogee Police Department (MPD), describing Mr. Allen and his car and advising that Mr. Allen was armed and had threatened family members. The teletype also advised that there was a 1983 warrant outstanding for Mr. Allen's arrest for impersonating an officer. Lt. Donald Smith of the MPD relayed the information to other officers during a squad meeting at 1:30 p.m.

Some time after the meeting, Lt. Smith was advised that Mr. Allen might be at his sister's house in Muskogee. Before he could meet with other officers, a radio dispatcher advised him that a 911 call had been made from Ms. Oakley's home and that Mr. Allen was threatening suicide. Lt. Smith proceeded to the Oakley home, approached the bystanders who were standing near Mr. Allen's vehicle, and ordered them to step back, which they did. Mr. Allen was sitting in the driver's seat with one foot out of the vehicle. He had a gun in his right hand, which was resting on the console between the seats.

As Lt. Smith repeatedly told Mr. Allen to drop his gun, Officer Bentley McDonald arrived and joined Lt. Smith at the driver's side door. Lt. Smith then reached into the vehicle and attempted to seize Mr. Allen's gun, while Officer Bentley held Mr. Allen's left arm. Officer Bryan Farmer, who arrived with Officer Bentley, approached Mr. Allen's car from the passenger side, and attempted to open a passenger side door. Mr. Allen reacted by pointing the gun toward Officer Farmer, who ducked and moved behind the car. Mr. Allen then swung the gun toward Lt. Smith and Officer McDonald, and shots were exchanged. Lt. Smith and Officer McDonald fired a total of twelve rounds into the vehicle, striking Mr. Allen four times. The entire sequence, from the time Lt. Smith arrived to the time Mr. Allen was killed, lasted approximately ninety seconds.

Plaintiff brought this § 1983 claim against the officers involved and against the City of Muskogee. Defendants subsequently moved for summary judgment, and set forth a statement of facts in their brief supporting the motion. In her response, Plaintiff did not dispute Defendants' statement of facts. The district court granted Defendants' motion, holding that there was no genuine issue of material fact and that Defendants were entitled to judgment as a matter of law.

Discussion

We review the grant of summary judgment de novo, and apply the same legal standard used by the district court under Rule 56(c). *Goldsmith v. Learjet, Inc.*, 90 F.3d 1490, 1493 (10th Cir. 1996). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A disputed fact is "material" if it might affect the outcome of the suit under the governing law, and the dispute is "genuine" if the evidence is such that a reasonable jury could

return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). We construe the factual record and reasonable inferences therefrom in the light most favorable to the nonmovant. *Gullickson v. Southwest Airlines Pilot's Assoc.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

The moving party need not affirmatively negate the nonmovant's claim in order to obtain summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Instead, the movant only bears the initial burden of "'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

In granting summary judgment, the district court went beyond the agreed-upon facts and made its own findings. The court found, for example, that the officers knew that Mr. Allen had claimed to have killed three people before arriving at his sister's home. Whether the officers knew does not alter our review, but Plaintiff is correct in pointing out that the court's finding is not supported by the record.

Although the Supreme Court has said that findings of fact are sometimes helpful to an appeals court on summary judgment review, *Anderson*, 477 U.S. at 250 n. 6, the district court on summary judgment should determine "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact," *id.* at 250. In this sense, traditional "findings of fact" are inappropriate in a summary judgment order, because if summary judgment is proper no findings of fact need be made and the case can be resolved as a matter of law. We read Anderson to mean only that it may be helpful when the district court summarizes undisputed facts. *See Regalado v. City of Commerce City*, 20 F.3d 1104, 1108 n. 1 (10th Cir. 1994)

(findings of fact are not required, but the *reasons* for granting summary judgment should be stated in the record).

I. The Individual Officers

We analyze a § 1983 claim of excessive force by determining whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances. *Graham v. Connor*, 490 U.S. 386, 397, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989); *Thompson v. City of Lawrence, Kan.*, 58 F.3d 1511, 1516 (10th Cir. 1995). The district court found no genuine issues of material fact, and held that the officers acted in an objectively reasonable way. We conclude, however, that the individual Defendants failed to carry their initial burden of demonstrating the absence of a genuine issue of material fact.

The excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force. *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995). Of course, the use of force must be judged from the perspective of a reasonable officer "on the scene," who is "often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. However, as we stated in *Sevier*: "the reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." 60 F.3d at 699. We will thus consider an officer's conduct prior to the suspect's threat of force if the conduct is "immediately connected" to the suspect's threat of force. *Romero v. Board of County Comm'rs*, 60 F.3d 702, 705 n. 5 (10th Cir. 1995), *cert. denied*, 133 L. Ed. 2d 728, 116 S. Ct. 776 (1996); *Bella*

v. Chamberlain, 24 F.3d 1251, 1256 n. 7 (10th Cir. 1994), *cert. denied*, 513 U.S. 1109, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995); *see also Tennessee v. Garner*, 471 U.S. 1, 8-9, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) (objective reasonableness inquiry requires courts to examine "whether the totality of the circumstances justified a particular sort of search or seizure").

The Defendants have not shown that there is a lack of a genuine issue of material fact with regard to the officers' reasonableness. *See Celotex*, 477 U.S. at 325. Indeed, it seems to us that Defendants have pointed out the presence of a genuine issue. Defendants acknowledged before the district court that there are differences among the eyewitness depositions. For example, some deposition testimony indicates that Lt. Smith ran "screaming" up to Mr. Allen's car and immediately began shouting at Mr. Allen to get out of his car; other testimony indicates that Lt. Smith approached cautiously, and tried talking Mr. Allen into giving up the gun.

Appellees label these disputes as "minor," but the substantive law indicates otherwise. *See Romero*, 60 F.3d at 705 n. 5 (an officer's conduct prior to the suspect's threat of force is relevant if the conduct is "immediately connected" to the suspect's threat of force). The entire incident, from the time Lt. Smith arrived to the time of the shooting, took only ninety seconds. Clearly, the officers' preceding actions were so "immediately connected" to Mr. Allen's threat of force that they should be included in the reasonableness inquiry. The differences in eyewitness testimony regarding the officers' approach are therefore material factual disputes. *Anderson*, 477 U.S. at 248 (holding that the substantive law determines whether a disputed fact is material).

The disputes are not only material, but they are also genuine. A dispute about a material fact is genuine if the evidence is such

that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. While we express no opinion on the merits, a reasonable jury could conclude on the basis of some of the testimony presented that the officers' actions were reckless and precipitated the need to use deadly force. *See Sevier*, 60 F.3d at 699.

BRISCOE, Circuit Judge.

II. The City of Muskogee

The plaintiff also claimed the City of Muskogee was liable under 42 U.S.C. § 1983 for inadequate training of the individually-sued police officers. After the district court determined the individual officers committed no constitutional violation, the court granted summary judgment to the City, reasoning that municipal liability requires a constitutional violation by the officers. Even assuming the court correctly interpreted that law of municipal liability, a question we need not and do not resolve, the court erred in entering summary judgment on that ground because we have concluded plaintiff presented sufficient evidence that the officers committed a constitutional violation to withstand a summary judgment motion. We review the propriety of summary judgment for the City de novo and find sufficient support for plaintiff's claim against the City to withstand summary judgment.

Once the moving party has carried its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). "The plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery

and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

"The inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989). To establish a city's liability under 42 U.S.C. § 1983 for inadequate training of police officers in the use of force, a plaintiff must show (1) the officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact, and (4) there is a direct causal link between the constitutional deprivation and the inadequate training. *Zuchel v. City and County of Denver*, 997 F.2d 730, 734-35 (10th Cir. 1993). *See Canton*, 489 U.S. at 389-91. As regards the second and third requirements, a showing of specific incidents which establish a pattern of constitutional violations is not necessary to put the City on notice that its training program is inadequate. Rather, evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability. *See Board of County Comm'rs v. Brown*, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997); *Canton*, 489 U.S. at 390 n. 10.

The first requirement is satisfied here because, as concluded in Section I of this opinion, there was evidence in the record to support the claim that the officers exceeded constitutional

limitations on the use of force. As regards the second requirement, exhibits presented to the district court contained evidence that it was common for officers to have to deal with mentally ill or emotionally disturbed people and people under the influence of drugs or alcohol. Nor is it uncommon for officers to have to deal with persons armed with deadly weapons. Thus, there was evidence that the use of force arose under circumstances that constituted a usual and recurring situation with which police officers must deal.

The third requirement is also satisfied. The record supports an inference that the training demonstrates a deliberate indifference on the part of the City toward people with whom the police come into contact. In *Canton*, the Court explained when inadequate police training constitutes city policy:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

489 U.S. at 390, 109 S. Ct. at 1205. The Court noted:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force,

> can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Id., n. 10, 109 S. Ct. at 1205 (citation omitted).

There was evidence presented to the district court that the officers received inadequate training on how to deal with mentally ill or emotionally upset persons who are armed with firearms. Plaintiff relied principally on her expert witness, Dr. George Kirkham, a former police officer and college professor and now a consultant on police and security matters. The record does not show that defendants challenged Dr. Kirkham's qualifications as an expert on police tactics and procedures.

Dr. Kirkham testified in his deposition that the officers' actions were reckless and totally contrary to proper police practices for dealing with armed mentally ill or emotionally upset persons. According to Dr. Kirkham, all authorities on police tactics and procedures, in both the law enforcement and expert witness communities, agree it is not appropriate to leave cover and approach a suicidal armed person to try to take away a gun. Such action is likely to provoke a violent response, resulting in a high risk of death to officers, the armed person, and other civilians. Dr. Kirkham stated the proper procedure would have been for the officers to take cover behind their police cars, to ask the people standing by Allen's car to come toward them in order to get them out of harm's way and to obtain information, and then to try to communicate with Allen from a safe position without doing anything aggressive that could provoke a violent response.

In Dr. Kirkham's opinion, there were only two possibilities that could give rise to the present incident--either the officers failed to follow their training or they were improperly trained.

Lieutenant Brook, the Muskogee Police Department training coordinator from 1984 to 1993, testified the officers acted in accordance with their training in approaching the car and trying to take away the gun. Relying principally on this testimony, Dr. Kirkham concluded the officers' training was inadequate. Dr. Kirkham was also aware that Lieutenant Smith testified he acted in accordance with his police training. Moreover, the affidavit of Glen McIntyre, the state firearms training coordinator, stated the officers followed their training. The evidence supports an inference that the City trained its officers to leave cover and approach armed suicidal persons to try to disarm them.

Dr. Kirkham was highly critical of the officers' training:

> I don't believe you'll find any reputable expert in the United States, no one that I know of, that could possibly take the position in contradiction of virtually every piece of training material that I have ever seen that says you handle it in this way. These are such well established principles. I don't think a reputable specialist could say, "Hey, yeah. You walk-up to the situation, stand in the open, keep trying to grab the gun."
>
> It is just reckless behavior.

Appellant's append. III at 572. He stated if the officers were trained to respond to this kind of call by staying in the open, leaving innocent people in the open, and doing provocative things like trying to grab the gun and get into the car, the training was "out of synch with the entire United States in terms of what police are being trained to do." *Id.* at 576.

> To my knowledge, I'm not aware of any significant debate in the law enforcement or expert witness community about the fundamental principles we're talking about here. Cover is better than no cover.

> Communicating from a safe distance is better than not. Getting innocent people as safely out of the way as possible is desirable. Not engaging in certain actions with mentally disturbed armed people, not getting close to them is preferable.
>
> I've never heard any knowledgeable debate or argument about any of those subjects in the 25 years I've been doing this type of work.

Id. at 580. Referring to the training provided the officers through a state program, Dr. Kirkham stated:

> If the State of Oklahoma through CLEET trains their officers to not be mindful of cover, to be aggressive with mentally ill people, do all these things that are totally off the board, then the State is wrong and out of synch with the rest of the country in the police profession.

Id. at 592-93.

When read as a whole and viewed in the light most favorable to the plaintiff as the party opposing summary judgment, the record supports an inference that the City trained its officers to leave cover and approach armed suicidal, emotionally disturbed persons and to try to disarm them, a practice contrary to proper police procedures and tactical principles.

The testimony of Lieutenant Brook and Lieutenant Smith and the affidavit of Glen McIntyre support an inference that the content of the training was inadequate. The City points to evidence that the officers completed many hours of training, including training on use of deadly force and dealing with upset or mentally disturbed people, but that cannot rebut the inference

that the training was inadequate because it does not address the content of that training.

Relying on *Evers v. General Motors Corp.*, 770 F.2d 984 (11th Cir. 1985), the City argues Kirkham's deposition must be disregarded as insufficient to raise genuine issues of material fact regarding the adequacy of the training. In *Evers*, the court held a four-paragraph affidavit by plaintiff's expert witness was insufficient to create genuine issues of material fact because its conclusory allegations were not based on specific facts. Dr. Kirkham's deposition is not comparable to the brief conclusory affidavit in *Evers*. The deposition is over 300 pages in length and Dr. Kirkham's opinion was based on specific facts in the record. His extensive and detailed testimony shows that although he may not have read all relevant documents, he was very familiar with the circumstances of the incident. *See Russo v. City of Cincinnati*, 953 F.2d 1036, 1046-47 (6th Cir. 1992) (rejecting argument that testimony of plaintiff's expert in police procedures was conclusory and insufficient to preserve genuine question of material fact over city's liability). *Cf. Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996) (unsubstantiated conclusions in affidavit of purported expert insufficient to preclude summary judgment in favor of city); *Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir.) (deposition of purported expert giving only subjective opinion not based on factual foundation or proven expertise insufficient to preclude summary judgment in favor of city), *cert. denied* 506 U.S. 824 (1992); *Allen v. Cook*, 668 F. Supp. 1460 (W.D. Okla. 1987) (unsubstantiated conclusions in affidavit of plaintiff's expert insufficient to preclude summary judgment in favor of city).

Dr. Kirkham characterized the officers' actions in this case as diametrically opposed to proper police procedures, out of synch with the rest of the police profession, and "plain foolishness." Because there was evidence that the officers acted in

accordance with their training, his criticism also applied to their training. When viewed in the light most favorable to the plaintiff, the record contains evidence that the officers were trained to act recklessly in a manner that created a high risk of death. The evidence is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need.[1]

As regards the fourth requirement, there was evidence of a direct causal link between the training and the alleged constitutional deprivation. According to Dr. Kirkham, approaching and trying to grab a gun from an emotionally disturbed, suicidal person created a high risk of death for officers, the armed person, and other civilians, and was reckless. There was evidence the officers were trained to act in such manner and, thus, were trained to do precisely the wrong thing. The causal link between the officers' training and the alleged constitutional deprivation is more direct than in cases in which officers are not given enough training to know the correct response to a dangerous situation. Dr. Kirkham attributed the incident to improper training, stating: "If police trainers in the State of Oklahoma are using this case as an example of how you properly handle a mentally ill individual, then police officers will assuredly die, and other mentally ill people and probably innocent people will die." Appellant's append. III at 574. It was his opinion that if the officers had been properly trained in the fundamental principles of maintaining a covered position and

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[1] There is no contention that the training given the officers was anything other than official city policy and Lieutenant Brook's testimony that the officers followed their training in handling the incident tends to show it was official policy. He was the training coordinator from 1984 to 1993.

trying to communicate with armed emotionally upset persons rather than approaching and physically attempting to disarm them, the incident would not have happened.

Because there was evidence supporting each of the requirements of Canton, as explained in *Zuchel*, the district court erred in entering summary judgment in favor of the City. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985), does not require a different conclusion. In *Tuttle*, the Court held it was error to instruct a jury it could infer from a single incident of unusually excessive force that the constitutional violation was attributable to a city policy of inadequate training or supervision. Here, plaintiff does not rely solely on proof of the single incident to support an inference that the incident was caused by inadequate training and that the inadequate training was city policy. She relies on evidence that the officers followed police training in recklessly rushing Allen's car and trying to disarm him. *Tuttle* and *Canton* do not require evidence of more than one incident to establish a policy of inadequate training and that the training caused the constitutional deprivation. These cases simply require evidence in addition to the occurrence of a single incident. A plaintiff can properly rely on the single incident if there is other evidence of inadequate training. *See Vineyard v. County of Murray*, 990 F.2d 1207, 1212-14 (11th Cir.), *cert. denied* 510 U.S. 1024, 126 L. Ed. 2d 594, 114 S. Ct. 636 (1993); *Russo*, 953 F.2d at 1041, 1046-48; *Bordanaro v. McLeod*, 871 F.2d 1151, 1159-63 (1st Cir.), *cert. denied* 493 U.S. 820 (1989); *Grandstaff v. City of Borger*, 767 F.2d 161, 169-72 (5th Cir. 1985); *Diaz v. Salazar*, 924 F. Supp. 1088, 1098-99 (D.N.M. 1996). By providing direct evidence of inadequate training, as discussed above, plaintiff provided sufficient evidence beyond the occurrence of the single incident to withstand summary judgment.

Nor does *Brown*, 137 L. Ed. 2d 626, 117 S. Ct. 1382, require a different result. The case before us is within the "narrow range of circumstances" recognized by *Canton* and left intact by *Brown*, under which a single violation of federal rights may be a highly predictable consequence of failure to train officers to handle recurring situations with an obvious potential for such a violation. The likelihood that officers will frequently have to deal with armed emotionally upset persons, and the predictability that officers trained to leave cover, approach, and attempt to disarm such persons will provoke a violent response, could justify a finding that the City's failure to properly train its officers reflected deliberate indifference to the obvious consequence of the City's choice. The likelihood of a violent response to this type of police action also may support an inference of causation--that the City's indifference led directly to the very consequence that was so predictable.

REVERSED and REMANDED.

KELLY, Circuit Judge, dissenting in part.

I respectfully dissent from Section II of the court's opinion. Permitting this case against Muskogee to go forward reverses the burden that the Supreme Court has deliberately chosen to place on the party opposing a motion for summary judgment. It also is inconsistent with the strict standard placed upon § 1983 plaintiffs in cases such as this one, where there has been absolutely no showing of a pattern of constitutional violations which might have put the City of Muskogee on notice that its training program was inadequate. *See Board of the County Comm'rs v. Brown*, 137 L. Ed. 2d 626, 117 S. Ct. 1382, 1391 (1997); *City of Canton v. Harris*, 489 U.S. 378, 390 n. 10, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989).

The court views this case as one in which "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation . . . triggers municipal liability." *Brown*, 117 S. Ct. at 1391 (citing *Canton*, 489 U.S. at 390 & n. 10). Although sufficient evidence of a single violation of federal rights exists, Ms. Allen has not made any showing--much less a sufficient showing--of an inadequate policy, nor is there proof that the allegedly inadequate policy presented such an "obvious potential" for constitutional harm that liability can or should be triggered.

The evidence is insufficient to establish the inadequacy of Muskogee's training because absolutely no evidence exists regarding the content of Muskogee's training. The court observes that none of the evidence in this case addresses the content of Muskogee's training, and assumes that it was Defendants' burden to put forward that content. *See* Ct. Op. at 13. The summary judgment standard, however, clearly places that burden on Ms. Allen. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (stating that the plain language of Fed. R. Civ P. 56(c) mandates entry of summary judgment if nonmoving party fails to make a showing sufficient to establish an element, and on which that party will bear the burden of proof at trial). Ms. Allen does not dispute that the Muskogee training exceeds Oklahoma's requirements for law enforcement training. In fact, the only evidence on the content of Muskogee's training at all are affidavits of two law enforcement officials that the individual officers acted in accord with that training. Ms. Allen's expert, Dr. Kirkham, stated that because the officers' actions were, in his opinion, contrary to proper police practices, and because two law enforcement officials stated that the officers acted in accord with their training, then Muskogee's training must have

been inadequate. Dr. Kirkham admitted, however, that he had not read either Muskogee's or Oklahoma's training materials. The court emphasizes that this evidence supports an "inference" that the City of Muskogee inadequately trained its police officers.[1] Although we must draw all factual inferences in favor of the nonmovant, those inferences must be reasonable. *Gullickson v. Southwest Airlines Pilot's Assoc.*, 87 F.3d 1176, 1183 (10th Cir. 1996) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). Dr. Kirkham's testimony, grounded in speculation, may raise an inference that Muskogee inadequately trained its officers, but it is not sufficient to withstand summary judgment. Rather, this inference, if it can be so called, constitutes, at best, a "mere scintilla" of evidence, on which a judgment in favor of the nonmovant cannot be upheld. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Even assuming that Ms. Allen has put forward sufficient evidence of inadequate training, that is still not enough under the circumstances. The evidence is not even close to establishing the kind of inadequate training that is "so obvious, and . . . so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Canton*, 489 U.S. at 390. In most cases, plaintiffs meet this standard by demonstrating that a pattern of constitutional violations has put the municipality on notice that its training is inadequate, and that the municipality's continued adherence to its training thus constitutes deliberate indifference. *See, e.g., Brown*, 117 S. Ct. at 1390 ("If a program does not prevent constitutional

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[1] At the end of Section II, this "inference," *see* Ct. Op. at 13, 15, has metamorphosed into "direct evidence" of inadequate training, *see* Ct. Op. at 16-17.

violations, municipal decisionmakers may eventually be on notice that a new program is called for."); *Zuchel v. City and County of Denver*, 997 F.2d 730, 740-41 (10th Cir. 1993) (holding that the defendant municipality was deliberately indifferent when it failed to change its training despite six deadly force incidents within a six-week time period, and despite repeated requests by the district attorney for new training). In this case, however, there is no allegation that previous similar incidents had put the City of Muskogee on notice that its training was inadequate. The Supreme Court has cautioned that in such cases, plaintiffs will succeed only in a "narrow range of circumstances." *Brown*, 117 S. Ct. at 1391. Thus, Ms. Allen must prove deliberate indifference by showing that a violation of federal rights was a "highly predictable" consequence of its failure to adequately train its police officers. *Id.* The mere fact that city police officers may have acted unconstitutionally cannot be the basis for municipal liability. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1977) ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory."); *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985) (plurality opinion) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which . . . can be attributed to a municipal policymaker.").

Given that there was no evidence before the court regarding the content of Muskogee's training, any deliberate indifference exhibited by Muskogee is pure speculation and conjecture. I do not believe there exists any evidence tending to place Plaintiff's case within the "narrow range of circumstances" in which liability may attach without any pattern of past constitutional violations. Ms. Allen has failed to make a showing sufficient to

establish an element on which she would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Accordingly, I would affirm as to the City of Muskogee.

APPENDIX B

[Filed Jan. 5, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 95-321-S

MARILYN ALLEN, Personal Representative
of Terry Allen,
Plaintiff

v.

MUSKOGEE, OKLAHOMA, et al.,
Defendants

ORDER

Granting Defendants' Motions for Summary Judgment

The plaintiff, Marilyn Allen, brings this civil rights cause of action against the defendants for the alleged wrongful death of her deceased spouse, Terry Allen, caused by the defendants' alleged use of excessive, unreasonable, and deadly force in violation of the Fourth Amendment by the defendant police officers during an armed confrontation with her decedent in Muskogee, Oklahoma.

The defendants, Muskogee, Oklahoma ("City") and Eskridge, Muskogee Chief of Police, have moved for summary judgment

on the grounds that the defendants City and Eskridge do not have a policy of using unnecessary force which is unconstitutional, that their training and supervision are constitutionally adequate, and there is no custom or practice or pattern of conduct concerning the use of force which is unconstitutional. Further, defendant Eskridge alleges it is uncontested that he personally participated in the incident.

The individual defendants Smith, McDonald, and Farmer, all police officers for the defendant City, have moved for summary judgment based upon qualified immunity, for the reason that their actions were in good faith and conformed to the proper and legal procedures and training of the defendant City's police department, and for the reason that their use of force in this incident was reasonable and necessary under the circumstances and the dictates of the Fourth Amendment.

The court finds that the plaintiff has generally agreed with the defendants' recitation of the undisputed facts (Plaintiff's responses and amended response, "Undisputed Facts", p. 1), and finds there are no genuine issues of material fact which would prevent the determination of these issues, such that summary judgment would be appropriate. Accordingly, pursuant to Rule 56, Federal Rules of Civil Procedure, the court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact:

1. On February 19, 1994, at their house in Porter, Wagoner County, Oklahoma, the plaintiff and her decedent/spouse Terry Allen got into an argument and assault over a card sent to plaintiff's decedent/spouse, allegedly by a former lover. The next day the argument escalated with the plaintiff's decedent/spouse battering the plaintiff and their children and threatening to kill the. The plaintiff's decedent/spouse left his residence in

Porter, and later called the plaintiff, telling her that he was going to kill a man that he believed was responsible for his brother's death in an automobile accident several years earlier, and then he was going to kill himself. A neighbor of the plaintiff reported the February 20, 1994, incident of domestic violence to the Wagoner County Sheriff's Office. (Plaintiff's deposition, Exhibit A, and Wagoner County offense report, Exhibit B, defendant City's motion).

2. Plaintiff's decedent/spouse proceeded to his sister Rhonda Oakley's house in Muskogee, Oklahoma, where he told his sister, "I'm going to die today, either by the pills or a policeman's gun", and that he had "killed three people on Highway 16". This last statement was later determined to be false. Ms. Oakley called 911, reporting that her brother, plaintiff's decedent/spouse, had overdosed on drugs and alcohol, that he was drinking and had chest pains, and that he had guns with him. The Wagoner County Sheriff's office had informed the Muskogee Police department of a description of plaintiff's decedent/spouse's car, that he was armed, that he was at his sister's house in Muskogee, and that there was an outstanding warrant for his arrest for impersonating an officer. (Wagoner County dispatches, Exhibits C and E, and Oakley deposition, Exhibit D, defendant City's brief; Admissions, Pretrial Order).

3. Defendant Smith, a Lieutenant patrol supervisor, was dispatched to the Oakley residence, and defendants Farmer, McDonald, and Crull, all Muskogee Police Officers, responded to that residence as backup. All of the policy officers at the scene had knowledge of the above information. The defendant officers observed plaintiff's decedent/spouse sitting in his car with three persons standing around the driver's door. As defendant Smith approached the driver's side of the vehicle, he

ordered the three people to step away from the vehicle, which they did. One of them, Lisa Perry, told defendant Smith that plaintiff's decedent/spouse had a gun. Defendant Smith observed plaintiff's decedent/spouse to be sitting behind the wheel of the vehicle with one foot on the ground through the open door on the driver's side of the vehicle with a gun in his right hand on the console between the seats. Defendant Farmer had proceeded to the passenger side of the vehicle. Several times, defendant Smith told plaintiff's decedent/spouse to drop the gun, but he refused to do so saying, "Go ahead and kill me; I want to die." Defendant Smith tried to reach into the vehicle to disarm plaintiff's decedent/spouse, but he was unsuccessful. Defendant McDonald stood on the driver's side of the vehicle near defendant Smith. Plaintiff's decedent/spouse then pointed the gun at defendant Farmer on the passenger side of the vehicle, and defendant Farmer ducked down and moved to the rear of the vehicle. Plaintiff's decedent/spouse then swung around and pointed his gun at defendants Smith and McDonald. Shots were exchanged between plaintiff's decedent/spouse and defendants Smith and McDonald. It is undetermined which side fired first, as the shots were nearly simultaneous. Plaintiff's decedent was shot and killed. Defendants Smith and McDonald were not shot. Approximately one and one-half minutes passed between the arrival of the defendant police officers and the shooting. (Perry deposition, Exhibit G, defendant City's brief; depositions of Smith, McDonald, and Farmer, Exhibits 7, 12 and 13, defendants' Smith, McDonald, and Farmer brief; Admissions, Pretrial Order).

4. The court finds that the defendants Smith, McDonald, and Farmer knew that the plaintiff's decedent/spouse

was under the influence of drugs and alcohol and was armed with a deadly weapon at the time of their confrontation. The court finds those defendants had information that plaintiff's decedent/spouse had committed battery upon his wife and children, had threatened to kill certain persons, and had stated he had killed three people, although this was untrue but know known by the officers to be untrue at the time of the confrontation. The court finds that the defendant police officers acted reasonably in requiring bystanders to withdraw and in attempting to talk with and disarm the plaintiff's decedent/spouse. The court finds that the plaintiff's decedent/spouse pointed a deadly weapon at the defendant officers, objectively placing them in fear of their lives or the life of another officer, and that the defendant police officers reacted reasonably to that threat in defense of themselves and others by shooting and killing the plaintiff's decedent/spouse. Thus, the court finds that the defendant police officers did not use unreasonable or excessive force in this situation, and they did not violate any Fourth Amendment rights of the plaintiff's decedent/spouse.

5. The defendant Eskridge was not personally involved in this incident, nor did he have knowledge of it until after the fact, not does plaintiff allege such to the contrary. (Plaintiff's amended complaint).

6. Having found no Fourth Amendment constitutional violation by the individual police officer defendants, there can be no liability as to their supervisory authorities, defendants City and Eskridge, and the court finds it unnecessary to make findings concerning their policies and/or training.

Conclusions of Law:

1. This court has jurisdiction and venue in this case. 28 U.S.C. §1331 and 42 U.S.C. §1983, and 28 §1391.
2. Summary Judgment shall be granted where the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Deepwater Investments, Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110-11 (10th Cir. 1991).
3. The mere existence of some factual dispute will not defeat a summary judgment motion. The factual dispute must be genuine and material to the issue or issues presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).
4. After a movant makes a properly supported motion for summary judgment, the non-moving party has the burden of setting forth *specific* facts showing the existence of a genuine issue of fact for trial. *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993). An affidavit containing only conclusions of law, unsupported by factual allegations, is insufficient to establish the existence of a triable issue. *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819, 824 (10th Cir. 1987). Likewise, conclusory allegations are not sufficient to establish factual issues. *Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384, 1392 (10th Cir. 1988).
5. Summary Judgment is appropriate when a court can conclude that no reasonable juror could find for the non-moving party on the basis of the evidence presented in the motion and response. *Anderson v. Liberty Lobby,*

Inc., supra at 250-252; *Windon Third Oil and Gas v. FDIC*, 805 F.2d 342, 346 (10th Cir. 1986).

6. All excessive force claims are analyzed under the reasonableness standard of the Fourth Amendment. This reasonableness inquiry is an objective one and heavily fact dependent. The factors employed to determine reasonableness are the severity of crime at issue, whether the subject poses an immediate threat to the safety of the officer or officers, and whether the subject is resisting arrest. *Wilson v. Meeks*, 52 F.3d 1547, 1552-53 (10th Cir. 1995), citing *Graham v. Connor*, 490 U.S. 386, 394-96 (1989)>

7. In an excessive use of deadly force claim, qualified immunity does not require a police officer to know or inquire into the state of mind or intentions of an assailant; it requires whether, taking all factors into consideration from an objective viewpoint, the police officer feared for his life (or the life of another) and reasonably reacted to that threat. *Wilson*, 52 F.3d at 1553-54.

8. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. *Graham*, 490 U.S. at 396-97.

9. Absent a finding of a constitutional violation by the person or persons supervised, a §1983 claim of inadequate training, supervision, and policies cannot be made out against a supervisory authority. *Webber v. Mefford*, 43 F.3d 1340, 1344-45 (10th Cir. 1994).

10. Supervisors of chiefs of police are not subject to vicarious liability, but are liable only for their own conduct. Thus, a supervisor or police chief may be held liable if he breaches his duty to train subordinates, to supervise or correct misconduct of which he or she has notice, or establish department procedures that will provide protection for constitutional rights. *McClelland v. Facteau*, 610 F.2d 693, 695-97 (10th Cir. 1979).

Pursuant to the above Findings of Fact and Conclusions of Law, the defendants' motions for summary judgment are granted.

IT IS SO ORDERED this 5th day of January, 1996.

/s/ Frank H. Seay
FRANK H. SEAY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-7021

MARILYN ALLEN, Personal Representative of
Terry Allen, deceased
Plaintiff - Appellant,

v.

MUSKOGEE OKLAHOMA, a municipal corporation:
REX ESKRIDGE, DON SMITH, BENTLEY MCDONALD,
BRYAN FARMER, and JAMES CRULL,
Defendants - Appellees.

Filed: September 12, 1997

Before KELLY, BRISCOE, LUCERO, Circuit Judges.

The petitions for rehearing filed by Appellee City of Muskogee and Appellees' Don Smith, Bentley McDonald, Brian Farmer and James Crull are denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the

court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: /s/ Lisa Good, Deputy Clerk